

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK**

In re: Oral Phenylephrine Marketing and
Sales Practices Litigation

This document relates to:

All actions.

Case No. 1:23-md-03089-BMC

Hon. Brian M. Cogan

**[PROPOSED] ORDER GOVERNING PLAINTIFFS' INITIAL STREAMLINED
CONSOLIDATED COMPLAINT AND DEFENDANTS' MOTION TO DISMISS IN
RESPONSE**

1. By May 3, 2024, Interim Class Counsel will file an Initial Streamlined Consolidated Complaint under New York law alleging representative examples of the conduct and claims they allege to be at issue in this Multidistrict Litigation relating, among other things, to the marketing and labeling of oral phenylephrine products.

2. By June 3, 2024, all named and served Defendants will file a single joint motion to dismiss raising arguments solely on preemption and/or primary jurisdiction. Plaintiffs' response will be due July 15, 2024, and Defendants' reply will be due August 5, 2024. For purposes of this motion only, the parties are excused from complying with the Court's requirement to request a pre-motion conference.

3. Regardless of when Plaintiffs file their Full Master Consolidated Complaint, Defendants shall not be obligated to answer or otherwise respond to the Full Master Consolidated Complaint until 45 days after the Court rules on Defendants' motion to dismiss the Initial Streamlined Consolidated Complaint. For the avoidance of doubt, Defendants shall not be obligated to raise any arguments for dismissal of either the Initial Streamlined Complaint or a Full Master Consolidated Complaint with respect to any issues other than preemption and/or primary

jurisdiction until their deadline to answer or otherwise respond to the Full Master Consolidated Complaint, a deadline that shall be set by the Court.

4. The Parties agree that to the extent the Court grants or denies Defendants' motion to dismiss based on preemption and/or primary jurisdiction, the order will apply to all cases in this Multidistrict Litigation or otherwise subject to transfer into this Multidistrict Litigation.

Parties' Reservation of Rights

5. **Plaintiffs.** In filing the Initial Streamlined Complaint, Plaintiffs will not be prejudiced by failure to (1) allege every single instance of the conduct they allege to be wrongful relating to the marketing and labeling of oral phenylephrine cold medicines, (2) identify all products at issue, (3) file on behalf of every named plaintiff in this litigation, or (4) refer to the laws of any state other than New York. Plaintiffs hereby commit to filing sufficient representative examples of the conduct and claims that they allege to be wrongful that a motion to dismiss based on preemption and/or primary jurisdiction will, if such arguments prevail, resolve this litigation in its entirety, regardless of additional specific examples of wrongful conduct, additional products named, additional Plaintiff-related allegations, or additional state-law claims that are pled or could be pled in a future Full Master Consolidated Complaint.

6. **Defendants.** In moving to dismiss the Initial Streamlined Complaint based only on preemption and/or primary jurisdiction, Defendants will not be prejudiced by failure to raise additional arguments for dismissal under Federal Rule of Procedure 12 unrelated to preemption and/or primary jurisdiction if, in the event the Court denies the motion to dismiss based on preemption and/or primary jurisdiction, a subsequent Full Master Consolidated Complaint is filed. Plaintiffs agree that, in the event the Court denies the motion to dismiss based on preemption and/or primary jurisdiction, Defendants shall be permitted to move to dismiss any subsequent Full

Master Consolidated Complaint based on any ground under Federal Rule of Civil Procedure 12(b) other than those issues that shall have already been briefed and addressed by the Court in ruling on the motion to dismiss the Initial Streamlined Complaint. Nothing about this stipulation, or the filing of any motion to dismiss the Initial Streamlined Complaint, waives any Defendants' personal jurisdiction defense.

SO ORDERED.

Dated: _____

THE HONORABLE BRIAN M. COGAN
UNITED STATES DISTRICT JUDGE